limitations from running under section 2244(d)(2). [App. 6-7] The Court concluded the first habeas petition was never "properly filed" thus precluding the corrected application from tolling the 1-year limitation period under the AEDPA and denied a certificate of appealability. [*Id.*]

Fifth Circuit: Petitioner timely applied to the Fifth Circuit Court of Appeals for a certificate of appealability. **Lopez v. Dretke**, No. 04-20134.

On August 17, 2004, Judge Davis denied the certificate of appealability [COA] stating Petitioner's application was time barred under 28 U.S.C. § 2244(d)(2) and that "Lopez has not shown that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. ..." [App. 1-2]

Petitioner's motion for rehearing filed on August 31, 2004, and his supplemental/amended motion for rehearing filed on September 1, 2004, were summarily denied on October 25, 2004. [App. 3]

REASONS FOR GRANTING THE WRIT

AEDPA's statute of limitations is tolled during "properly filed" state post-conviction proceedings. 28 U.S.C. § 2244(d)(2). This certiorari petition presents several important issues, which have divided the Courts of Appeal, regarding the meaning of "properly filed."

It is undisputed that Petitioner's habeas petition is timely filed if his state petition was "properly filed." It is also undisputed that Petitioner's habeas petition is timely if his state post-conviction proceedings equitably tolled AEDPA's statute of limitations. This Court should grant the writ to resolve important equitable tolling issues and prevent the "patently unfair" and "extraordinary deprivation of rights" caused by the Fifth Circuit's law and holding in this case.

I. This Court should grant the writ where the Fifth Circuit Court of Appeals, in denying a certificate of appealability, refused to review the District Court's decision on an important federal question decided in a way that conflicts with this Court's holding in Artuz v. Bennett, 531 U.S. 4 (2000) - regarding when a state post-conviction petition is "properly filed" under § 2244(d)(2).

This Court in **Artuz v. Bennett**, 531 U.S. 4 (2000), specifically held that a state application seeking post-conviction relief "is 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee. ..." Id. at 8.

In compliance with the State's procedural rules under Article 11.07 of the Texas Code of Criminal Procedure,[1] and its rules of form under Rule 73.3 of the Texas Rules of Appellate Procedure,[2] Petitioner completed the form required for instituting a post-conviction proceeding, attached to the form his referenced and supporting documentation, and filed his state habeas petition with the District Clerk in the county of his conviction. According

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[1] See App. 13-15 of Appendix for recitation of Article 11.07, of the Texas Code of Criminal Procedure.

[2] See App. 16-18 of Appendix for recitation of Rule 73.3, Texas Rules of Appellate Procedure.

to this Court's holding in ***Artuz v. Bennett, supra,*** Petitioner had done everything that was required of him for his state habeas proceeding to be "properly filed" for purposes of tolling the 1-year limitations period under § 2244(d)(2).

Although Petitioner was required by the state courts to file a corrected state habeas form as directed by the Clerk of the Court of Criminal Appeals, that Court did not treat the corrected petition as a successive petition as neither the State Trial Court nor the Texas Court of Criminal Appeals issued or filed an order directing the dismissal of Petitioner's state court habeas proceeding after it was filed on April 3, 2001.[3]

In his order dismissing Petitioner's federal habeas petition with prejudice, Judge Hittner found that the first state writ application was never properly filed and did not toll the statute of limitations. He reached this conclusion based upon his finding that

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[3] Article 11.07, Section 4(a) of the Texas Code of Criminal Procedure, "If a subsequent application for writ of habeas corpus is filed after final disposition of an initial application challenging the same conviction, a court may not consider the merits of or grant relief based on the subsequent application. ..."

the Clerk of the Court of Criminal Appeals returned the application without ever docketing or submitting it to the Court. [App. 4-9]. Moreover, notwithstanding the fact that the State Courts did not treat Petitioner's corrected state habeas petition as successive, the District Court nonetheless found that Petitioner filed a "second state application" after the period of limitations had expired. [*Id.*] The Fifth Circuit denied a certificate of appealability and therefore left standing the District Court's decision.

This Court held in *Artuz* that:

> An application is "filed," as that term is commonly understood, when it is delivered to, and accepted by, the appropriate court officer for placement into the official record. ...

Id. at 8.

Texas law required that Petitioner file his state application for writ of habeas corpus "with the clerk of the court in which the conviction being challenged was obtained." Texas Code of Criminal Procedure, Article 11.07 § 3(b). [App. 13] After a state petition is filed, it is then the responsibility of the District Clerk to transmit the habeas record compiled in the trial court to the Court

of Criminal Appeals. [App. 13-14] He filed the state petition on the form prescribed and the state proceedings commenced accordingly. The filing of a corrected form as directed by the Clerk of the Court of Criminal Appeals was neither a jurisdictional bar nor a failure to comply with the applicable laws and rules governing filings of an application in the State Court.

Petitioner complied with all applicable laws and rules required of him to properly file a state habeas proceeding. The District Court's holding to the contrary and the Fifth Circuit's refusal to grant a certificate of appealability places upon State prisoners an onerous burden without notice. The District Court's holding which the Fifth Circuit has allowed to stand holds state prisoners accountable when State Court officials interfere with statutory requisites of exhausting state remedies. 28 U.S.C. § 2254(b) and (c). Under the rationale espoused by the District Court and Fifth Circuit, if the State Courts fail to act within the 1-year limitations period, a state prisoner must file his federal application before exhausting state remedies and then seek a stay

of the federal proceedings pending exhaustion requirements for fear that he may not have "filled-in-all-the-blanks" on a given form or any number of other reasons that a State Court may request additional information or corrections. The requirements being placed on access to the Great Writ, as in this case, are onerous and unconscionable.

This Court should grant the writ to resolve whether the Fifth Circuit Court of Appeal's holding conflicts with relevant decisions of this Court on this important matter. See Supreme Court Rule 10(c).

II. This Court should grant the writ because the district court and Fifth Circuit panel, in denying a certificate of appealability [COA], erred in its resolution of the important issue that is in direct conflict with this Court's holding in *Artuz*.

This Court has not decided the statutory tolling issue presented here – can State Court officials' actions resulting in an untimely state post-conviction petition be "properly filed" under §2244(d)(2)? This Court should grant the writ to decide this important issue. See Supreme Court Rule 10(c). Moreover, this

is a particularly apt case in which to grant the writ, because the district court and the Fifth Circuit panel in this case answered this question erroneously. While *Artuz* did not directly address this issue, *Artuz*' analysis shows that Petitioner's State proceedings were "properly filed", and the district court and Fifth Circuit panel erred in holding they were not.

A. The district court and Fifth Circuit defines "properly filed" in a way that was rejected by Artuz, and that is inconsistent with this Court's precedent regarding the importance of habeas corpus.

Artuz rejected the argument that a state court procedural bar ruling makes the state court proceedings not "properly filed" under § 2244(d)(2):

> [The state] contends ... that an application for state post-conviction ... review is not "properly filed" ... unless it complies with all mandatory state-law **procedural requirements** that would bar review of the merits of the application. **We disagree.**

Artuz, 531 U.S. at 8.

The District Court's opinion in this case, which the Fifth Circuit upheld, misconstrues *Artuz*. The District Court and the

Fifth Circuit held that under AEDPA the statute of limitations is tolled only when the State claims do not violate the state's **procedural requirements**. See, also, **Fahy v. Horn**, 240 F.3d 239, 243 (3d Cir. 2001).

In particular, because the Texas State use of a particular form is one of "the state's procedural requirements", the district court, to which the Fifth Circuit panel agreed, holds that the failure to fill-in-the-blanks of the Texas State petition renders the pleading so defective so that it is not "properly filed." ***Id.***

The district court's and Fifth Circuit panel's approach was rejected in ***Artuz***. The district court and Fifth Circuit plainly erred when it inferred that AEDPA directs tolling or when the Texas State form is completed in full so that it does not violate the state's procedural requirements. Instead, AEDPA "explicitly directs" tolling during "properly filed" state court proceedings, and ***Artuz*** held that state court proceedings are "properly filed" when the claims violate "the state's procedural requirements." Thus, the District Court below and the Fifth Circuit reasoning was rejected

by ***Artuz***.

The district court's approach is also inconsistent with this Court's precedent regarding the importance of the writ of habeas corpus, and the need for clear, fair rules governing access to the writ. The district court makes the "properly filed" - or - not status of state post-conviction proceedings depend entirely upon the state courts' ultimate ruling – if the state court ultimately deems the claims timely, they were "properly filed" all along; if it ultimately deems them untimely, they were never "properly filed". This outcome-determined approach makes it impossible for petitioners to know in advance whether their state court proceedings will ultimately be deemed "properly filed" or not, especially where, as here, state law is unclear at the time of the state court filing.

Because habeas corpus is the "highest safeguard of liberty," **Lonchar v. Thomas**, 517 U.S. 314, 322 (1996), and "plays a vital role in protecting constitutional rights," **Slack v. McDaniel**, 529 U.S. 473, 483 (2000), "it is particularly important that **any rule that would deprive inmates of all access to the writ** should be

both clear and fair." *Lonchar* at 330. The approach of the district court below violates this fundamental principle because it denies prisoners all access to federal habeas review simply because they could not predict how the state courts would ultimately rule. The test espoused upon state prisoners by the district court below cannot be squared with this Court's law, especially since it was the dilatory actions of state court officials which such a rule now imputes to a habeas applicant.[4]

B. Under Artuz' analysis, a State petition that is ultimately deemed technically barred by the state courts is "properly filed" under § 2244(d)(2).

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4. In the procedural default context, a state court procedural bar may bar federal merits review of individual claims. But procedural default of claims never bars all federal review, as the district court's approach does. Moreover, procedural default rules do not bar federal merits review at all, even of individual claims, when the state court ruling is not an "adequate and independent state ground" or when the petitioner can establish "cause and prejudice" or a "miscarriage of justice". E.g., **Lee v. Kemna**, 534 U.S. 362 (2002). The district court's definition of "properly filed" does not allow such safety valves, and offers no protection from arbitrary, unpredictable state court rulings: under the law espoused by the district court, if the state court applies an arbitrary and unreasonable procedural bar the federal court must find the proceedings not "properly filed."

Artuz' "properly filed" analysis is grounded in the distinction between "conditions to filing" and "conditions to obtaining relief". *Id.*, 531 U.S. at 11. If a state post-conviction petition violates a "condition to filing", it is not "properly filed". If the claims in the petition just violate a "condition to obtaining relief", however, the petition is "properly filed." Here, the state courts did not, as interpreted by the District Court and approved by the Fifth Circuit panel, determine that Petitioner's claims were procedurally barred as a result of a failure to fill-in-all-the-blanks on the form that was initially "properly filed" in the state courts to deny Petitioner's claims. Under *Artuz*' analysis, however, the State defect in pleading resulting from a failure to fill-in-the-blanks is a "condition to obtaining relief" on claims, not a "condition to filing" the petition.

Artuz gave an example of a typical "condition to filing", violation of which would make a petition not "properly filed." The rule governing filing of successive federal habeas petitions, which requires a would-be petitioner to obtain permission before filing a

successive petition. *Id.* at 10 (citing 28 U.S.C. § 2244(b)(3)(A)). The Texas State Appellate Rule of "fill-in-all-the-blanks" is utterly different from *Artuz*' paradigmatic "condition to filing". A State petitioner does not need permission to file a State petition, even if it is facially lacking in merit. Instead, s/he is entitled to file such a petition, in the same court where any State petition is filed and the State Courts are required to accept such petitions for filing. When a petition is filed, the state courts are required to carefully review it to determine if any claims exist that would require further proceedings or a hearing; if the lower court determines the claims are without merit or do not warrant a hearing, the petition along with the habeas record is automatically transmitted to the Texas Court of Criminal Appeals. There is no barrier whatsoever to filing and judicial review – the State fill-in-all-the-blanks bar is not a "condition to filing".

The specific facts of this case confirm that the State Court rules allow the filing and litigation of a State petition, even if the claims in that petition are ultimately deemed lacking in merit.

Here, the State Courts allowed Petitioner to file his April 3, 2001, State petition, as they were required to do by state law. Indeed, the District Court required the state's attorney to file a response and the district clerk then transmitted the habeas record to the Texas Court of Criminal Appeals. Upon receipt by the Texas high court, a letter was directed to the district clerk to notify the Petitioner of a defect in his pleading. Once corrected and returned to the district clerk, the State petition was not treated by either the state trial court or the Texas Court of Criminal Appeals as a successive petition. Inasmuch as only the Texas Court of Criminal Appeals can grant habeas relief, the defect noted by the Court of Criminal Appeals' clerk for correction was a "condition to obtaining relief", especially since the corrected application was not treated by either the trial court or the Texas Court of Criminal Appeals as a successive petition.

The State fill-in-all-the-blanks as a "condition for obtaining relief" on claims, rather than a "condition to filing" a petition, is apparent from the fact that it was not dismissed as a successive

petition. As *Artuz* explains, § 2244(d)(2) "refers only to 'properly filed' applications and does not contain the peculiar suggestion that a single application can be both 'properly filed' and not 'properly filed' because some claims in the application are timely and others are not. *Artuz* at 10. Since a State petition may contain both meritorious and frivolous claims, the State fill-in-all-the-blanks requirement is a "condition to obtaining relief" on claims, not a "condition to filing" the petition.

Under *Artuz'* analysis, Petitioner 's State petition was "properly filed". This Court should grant the writ to conform the district court's and Fifth Circuit panel's law to this Court's precedent.

III. This Court should grant the writ and review the district court's and Fifth Circuit panel's denial of equitable tolling, which denies all federal habeas review to petitioners who act "appropriately", "reasonably" and "diligently", and as demanded by the exhaustion requirement, in seeking state court remedies.

The District Court's and Fifth Circuit's erroneous approach to statutory tolling (described above) is particularly unfair because it is combined with an extraordinarily harsh approach to equitable

tolling, which denies equitable tolling in cases, like this one, where the petitioner acted "appropriately", "diligently" and "reasonably" in seeking state court remedies at a time when they appeared to be available, and when seeking such state Court remedies was required by the exhaustion requirement. **Merritt v. Baine**, 326 F.3d 159, 168-169 (3d Cir. 2003)(denying equitable tolling where "it was not unreasonable (indeed it was appropriate) for ***Merritt*** to have believed he was required to exhaust his state remedies by filing a second State petition prior to filing a [federal] habeas petition," and he "acted diligently and reasonably wen he filed his second State petition rather than filing a habeas petition").

The district court's erroneous statutory tolling law makes the habeas petitioner's ability to obtain any federal review completely dependent on the actions and rulings of state court actors. If, as in this case, the state trial court clerk, judge and the state's attorney initially deemed the petition properly filed only to later find that there was a defect not otherwise detected or deemed sufficiently material to the petition being "properly filed", the

period of time used in bringing to the Petitioner's notice any defect as a "condition to obtaining relief" should not be held attributable to the Petitioner. In the interest of fundamental fairness, a court that adopts such an outcome-determinative approach to statutory tolling should at least couple it with an equitable tolling analysis that allows tolling when the ultimate outcome is not clear at the time the petitioner originally seeks state court remedies. The District Court opinion approved by the Fifth Circuit, however, has not done so. Instead, it denies equitable tolling where, as here, the petitioner acts diligently, reasonably and appropriately in seeking state court remedies when those remedies appear to be available, and when pursuit of those remedies is actually required by the exhaustion requirement. This result is draconian – the petitioner does everything reasonably as required by current law, and then is thrown out of court. A proper equitable tolling analysis requires equitable tolling here, for the following reasons:

1. As stated above, when Petitioner filed his State petition, it seemed that the state courts would give merits review even if his

claims were written on attached papers to the from that was, in fact, used. The state courts had a long tradition of disregarding the State's statutory bar rules when the petitioner alleged, as Petitioner did here, an involuntary plea, use of a coerced confession, use of tainted evidence secured from an unlawful arrest, denial of right against self-incrimination, non-disclosure of exculpatory evidence, violation of his right against double jeopardy, denial of effective assistance of counsel, denial of the right to appeal, imposition of a sentence that is cruel and unusual, and miscarriage of justice; it was reasonable to believe the state courts would continue to apply these bar-trumping rules; in particular, it was reasonable to believe they would not use an unwritten new "fill-in-all-the-blanks" rule to bar Petitioner from exhausting state remedies. Ultimately, the state courts created an unwritten new "fill-in-all-the-blanks" rule, strictly applied it to Petitioner's state petition, and held Petitioner accountable for the failure of these state court actors who failed to act diligently and reasonably after Petitioner's State petition was "properly filed".

Under these circumstances, where Petitioner diligently sought relief in a forum (state court) that reasonably appeared to be available, where he sought that relief within the AEDPA year, and where he only later found that relief was not available after all, this Court and the Court of Appeals generally allow equitable tolling.[5]

2. Because state court remedies appeared to be

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[5] E.g., **Burnett v. New York Central R. Co.**, 380 U.S. 424, 430 (1965)(equitable tolling to avoid "unfairness of barring ... action solely because a prior timely action is dismissed for improper venue after the applicable statute of limitations has run"); **Clymore v. United States**, 217 F.3d 370, 376 (5th Cir. 2000)(equitable tolling where litigant filed in wrong venue and statute of limitations expired during wrong venue litigation; "Given (1) the uncertainty of the law regarding the proper venue in which to file and (2) the government's awareness [that Clymore was seeking relief], the limitations period should be equitably tolled."); **Doherty v. Teamsters Pension Trust Fund**, 16 F.3d 1386, 1393 n.7 (3d Cir. 1994)(when there are "uncertainties about the law" regarding forum where claims should be filed, equitable tolling avoids "penaliz[ing] litigants for having made questionable procedural choices of forum"); **Husch v. Szabo Food Service Co.**, 851 F.2d 999, 1003-1004 (7th Cir. 1988)(equitable tolling where plaintiff filed claims in wrong forum because of "confusing" law); see also **Young v. United States**, 535 U.S. 43, 50 (2002)("This Court has permitted equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period"(internal quotation marks omitted)).

available to Petitioner; federal law required him to pursue those state court remedies, by filing a State petition, before filing a federal habeas petition. The Fifth Circuit requires Texas prisoners to file State petitions and exhaust state court remedies if there is any possibility of state court merits review.[6]

In compliance with Fifth Circuit exhaustion law at the time, Petitioner filed his State petition to exhaust seemingly available state court remedies before filing his federal habeas petition. If Petitioner had instead filed a federal habeas petition, Fifth Circuit law would have required that it be dismissed for lack of exhaustion.

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Wilder v. Cockrell, 274 F.3d 255, 259 (5th Cir. 2001)(stating that a fundamental prerequisite to federal habeas corpus relief under 28 U.S.C. § 2254 is the exhaustion of all claims in state court before requesting federal habeas relief); **Mercadel v. Johnson**, 179 F.3d 271, 276-277 (5th Cir. 1999)(holding that federal courts lack the power to grant habeas relief on unexhausted claims); **Dispensa v. Lynaugh**, 847 F.2d 211, 217 (5th Cir. 1988)((a petitioner must present his claims to the state courts in such a fashion so as to afford those courts a fair opportunity to rule on the merits); **Dupuy v. Butler**, 837 F.2d 699, 702 (5th Cir. 1988)(citing **Carter v. Estelle**, 677 F.2d 427, 443-444 (5th Cir. 1982) and holding a habeas petitioner must provide the state's highest court with a fair opportunity to pass upon the issues raised in the petition for federal habeas relief).

Under these circumstances, where Petitioner's state court filing was required by the Fifth Circuit and district court precedent regarding exhaustion of state remedies, denial of tolling during the state court proceedings simply cannot be correct. It is an extraordinary deprivation of rights and patently unfair for the habeas courts to now deem Petitioner time-barred under AEDPA for doing what he was required to do by Fifth Circuit exhaustion law – exhaust state remedies before pursuing federal review. The fact that the state authorities held his State petition without providing him notice of any defect in the pleadings until after the 1-year limitation under the AEDPA had expired cannot work to deprive him of his right of access to the Great Writ. Holding Petitioner accountable for the dilatory acts of state officials is so extraordinary as to constitute a manifest miscarriage of justice. Equitable tolling is plainly appropriate.

3. Equitable tolling is also appropriate because the State of Texas misled Petitioner about the State requirement of a new rule requiring that he "fill-in-all-the-blanks" on the form required

for filing a state petition for habeas corpus. In particular, the rule which requires the use of the form under Texas law does not state nor does the habeas statute make reference to any rule or requirement that when filing a state habeas corpus petition by a convicted felon that the failure to "fill-in-all-the-blanks" the prohibition of making reference to attached papers would preclude exhaustion of remedies thus acted to mislead Petitioner into believing that full compliance with the rules for applying for a state writ of habeas corpus by using the form was sufficient. By creating a new rule after the time limitations had run under the AEDPA justified equitable tolling. Petitioner should not be held accountable for the dilatory actions of state authorities responsible for processing, litigation, and adjudicating the state application.

4. Equitable tolling is particularly appropriate here, where failure to toll results in complete denial of all federal habeas review. Because habeas corpus is the "highest safeguard of liberty," ***Lonchar***, 517 U.S. at 322, and "plays a vital role in protecting constitutional rights," ***Slack***, 529 U.S. at 483, "it is

particularly important that any rule that would deprive inmates of all access to the writ should be both clear and fair." ***Lonchar*** at 330. Here, where it was not clear that the state courts would ultimately act in such a dilatory manner and in such a way as to cause and then later argue expiration of the 1-year limitation under the AEDPA and yet still require Petitioner in accordance with 5th Circuit precedent to exhaust state court remedies before filing a federal habeas petition, AEDPA's limitations period should be tolled.

5.Under these circumstances, imputing the delays of state authorities to the Petitioner who had no control over the responsibilities of those state actors, especially in view of his imprisonment, denial of any tolling and the resulting loss of any federal review is an extraordinary deprivation of rights and patently unfair. Equitable tolling should be allowed.

IV. Should this Court grant the Writ to resolve the conflict between the Fifth Circuit and the Ninth and Seventh Circuit Courts of Appeal in applying the relation back doctrine in habeas actions under Federal Rules of Civil Procedure 15 (c)(2)?

The corrected State Court application filed after notice of the "fill-in-all-the-blanks" letter issued did not alter or change any of the grounds which were raised in the original application. The Respondent did not alter its answer. The State trial court entered its findings and conclusions based upon the same record. Neither the State Trial Court nor the Texas Court of Criminal Appeals considered Petitioner's state application as a "successive petition."

The fact that Petitioner filed a corrected state habeas application form did not preclude the State Trial Court from considering the prior pleadings as originally filed so that the corrected state application form "related back" to the original filing commencing the State Court proceedings.

The relation-back doctrine allows an amended pleading to relate back to the original pleading and its file date if the causes of action asserted in the amended pleading are based upon the same transaction or occurrence that formed the basis of the claims made in the original pleading. Federal Rules of Civil Procedure 15(c)(2). **Mayle v. Felix,** 379 F.3d 612 (9th Cir. 2004); **Newell v.**

Hanks, 283 F.3d 827, 834-835 (7th Cir. 2002).

Texas law has codified the relation-back doctrine under Texas Civil Practices & Remedies Code § 16.068 (Vernon 1986), which provides:

> If a filed pleading relates to a cause of action, cross-action, counter-claim, or defense that is not subject to a plea of limitations when the pleading is filed, a subsequent amendment or supplement to the pleading that changes the facts or grounds of liability or defense is not subject to a plea of limitations unless the amendment or supplement is wholly based on a new, distinct, or different transaction or occurrence.

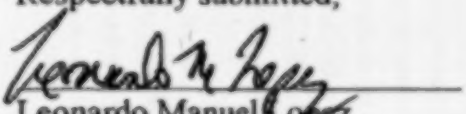
See, **Ex Parte Goad**, 690 S.W.2d 894, 896 (Tex.1985); **Guajardo v. Liberty Mutual Insurance Co.**, 831 S.W.2d 358, 364 (Tex.App.-Corpus Christi 1992); **Milestone Properties, Inc. v. Federated Metals Corp.**, 867 S.W.2d 113, 116-118 (Tex.App.-Austin 1993).

The District Court's opinion that the Fifth Circuit upholds by refusing to grant a certificate of appealability are in direct conflict with the decisions of the Seventh and Ninth Courts of Appeal and the decision by the Supreme Court of Texas. Supreme Court Rule 10(a). The writ should issue to resolve this conflict.

CONCLUSION

For the reasons stated above this Court should grant the writ and review the decision of the United States District Court for the Southern District of Texas and the refusal of the United States Court of Appeals for the Fifth Circuit to grant a certificate of appealability.

Respectfully submitted,



Leonardo Manuel Lopez
Petitioner Pro Se
TDCJ Inmate # 904591
Ramsey 1 Unit
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Rosharon, Texas 77583

APP. 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 04-20134
U.S.D.C. No. H-02-CV-4906

LEONARDO MANUEL LOPEZ,
Petitioner-Appellant,

versus

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

ORDER:

Leonardo Manuel Lopez, Texas prisoner #904591, has applied for a certificate of appealability ("COA") for an appeal from the dismissal of his application for a writ of habeas corpus challenging his 1999 conviction and 35-year prison sentence for murder as time-barred under 28 U.S.C. § 2244(d)(1). See 28 U.S.C. § 2253(c)(1)(A). Lopez contends that the district court erred in determining that his state habeas application did not toll the limitation period pursuant to 28 U.S.C. § 2244(d)(2). Lopez contends also that the district court erred in refusing to equitably toll the limitations period. Because Lopez has not shown that jurists of reason would find it debatable whether the district court was correct in its procedural ruling, see, Slack v. McDaniel, 529 U.S. 473, 484 (2000), COA is DENIED.

Lopez contends that the case should be remanded for an evidentiary hearing. This motion is DENIED AS MOOT.

W. Eugene Davis
United States Circuit Judge

APP. 3

IN THE UNITED STATES COURT OF APPEALS
FO R THE FIFTH CIRCUIT

NO. 04-20134

LEONARDO MANUEL LOPEZ,
Petitioner-Appellant,

versus

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONS DIVISION,
Respondent-Appellee.

Appeal form the United States District Court for the Southern District of Texas, Houston

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Before DAVIS, SMITH, and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that appellant's motion to file motion for reconsideration out of time is GRANTED.

IT IS FURTHER ORDERED that appellant's motion to file supplemental/amended motion for reconsideration out of time is GRANTED.

A member of this panel previously denied appellant's request for Certificate of Appealability. The panel has considered appellant's motion for reconsideration. IT IS ORDERED that the motion is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LEONARDO MANUEL LOPEZ, Petitioner,	]	
versus	]	CIVIL ACTION NO. H-02-4906
DOUG DRETKE, Director, Texas Department of Criminal Justice, Institutional Division, Respondent.	]	

MEMORANDUM ON DISMISSAL

Pending before the Court is Respondent's Motion to Dismiss Pursuant to 28 U.S.C. § 2244(d). This Court will GRANT the motion for the reasons stated below.

In 1994, Petitioner entered a no contest plea to the charge of murder. The state court granted Petitioner's application for deferred adjudication and released him on probation for 10 years. On December 17, 1999, the court revoked Petitioner's deferred-adjudication probation and sentenced him to 35 years confinement. On August 10, 2000, the Texas 14th Court of Appeals affirmed his adjudication-of-guilt conviction. Petitioner did not file a Petition for Discretionary Review in the Texas Court of Criminal Appeals.

On April 3, 2001, Petitioner, by counsel, filed a state application for a writ of habeas corpus. On March 22, 2002, the Clerk of the Texas Court of Criminal Appeals returned Petitioner's application to the Harris County District Clerk for failure to comply with Rule 73.2 of the Texas Rules of Appellate Procedure. Specifically, Petitioner did not set out the grounds of his writ on the form, but instead he referenced them in exhibits and transcripts. Petitioner filed a second state writ application on April 12, 2002. This second application was denied on September 18, 2002.

Petitioner filed this federal application on December 23, 2002.

On April 24, 1996, the President signed the Antiterrorism and Effective Death Penalty Act of 1996, which amended the habeas corpus statutes. It states in part:

> (d)(1) A 1-year period of limitations shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244 (d)(West 1996).

Petitioner's conviction became final on September 9, 2000. That date is the last day to petition for discretionary review. *See* TEX. R. APP. PROC. 68.2(a). There is no showing that subsections (B), (C), and (D) of § 2244(d)(1) apply to Petitioner's

claims. The limitation period expired a year later, on September 9, 2001, absent tolling.

Respondent contends that the first state writ application was not properly filed and therefore the statute of limitations is not tolled under subsection 2244(d)(2) by the pendency of that writ application. *See* Respondent Cockrell's Supplemental Response (Docket Entry No. 12). Respondent also contends that Petitioner is not entitled to equitable tolling. *Id.*

In discussing whether an application is properly filed for section 2244(d)(2) purposes, the Supreme Court has said that "[a]n application is 'filed' ... when it is delivered to, and accepted by, the appropriate court officer for placement into the official record." *Artuz v. Bennett*, 531 U.S. 4, 8 (2000). The Court further said "an application is 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example, the form of the document...." *Id.* The Court of Appeals for the Fifth Circuit has held "that a 'properly filed application' for § 2244(d)(2) purposes is one that conforms with a state's applicable procedural filing requirements." *Villegas v. Johnson*, 184 F.3d 467, 469-70 (1999). The Fifth Circuit noted:

> By procedural filing requirements, we mean those prerequisites that must be satisfied before a state court will allow a petition to be filed and accorded some level of judicial review. Such filing requirements are not limited to the rules governing notice and the time and place of filing and may include, for example, a requirement that the petitioner obtain judicial authorization for the filing.

Id., n. 2.

Petitioner's first state writ application was tendered to the Clerk of the Texas Court of Criminal Appeals. However, apparently the clerk never formally docketed it. The Court of Criminal Appeals Clerk assigned Petitioner's second writ

application docket number 53,193-01. The "-01" designation indicates that it was Petitioner's first official application in the Court of Criminal Appeals. This presumably explains why Respondent did not mention this application in his motion to dismiss, i.e., it did not show up in a search of the records of the Court of Criminal Appeals. The clerk returned the application without ever submitting it to the Court of Criminal Appeals for review. *See* Response to Cockrell's Motion to Dismiss (Docket Entry No. 9), Exh. D. Petitioner's state writ application filed on April 3, 2001, was not properly filed for purposes of 28 U.S.C. § 2244(d)(2). *See Artuz*, 531 U.S. at 8; *Villegas*, 184 F.3d at 469-70. Petitioner's first state writ application did not toll the statute of limitations.

Petitioner filed his second state habeas application on April 12, 2002. The pendency of his second state application did not toll the limitations period "because it was not filed until *after* the period of limitation had expired." *Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000)(emphasis in original). Petitioner filed this federal application on December 23, 2002, more than 15 months after the limitation period expired. Petitioner's federal application is time barred, unless equitable tolling is appropriate.

The Clerk did not notify Petitioner of the deficiency of the form in his state application until fourteen months after he submitted it. This raises the possibility that Petitioner is entitled to equitable tolling. *See Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998)(the AEDPA statute of limitations is subject to equitable tolling).

Equitable tolling should only be used in "rare and exceptional circumstances." *Id.* "Equitable tolling applies principally where the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights." *Coleman v. Johnson*, 184 F.3d 398, 402 (5th Cir. 1999). The petitioner bears the burden of proof on equitable tolling. *See Phillips v. Donnelly*, 216 F.3d 508 (5th Cir. 2000).

Petitioner has an obligation to monitor his lawsuits apart from any duty of the clerk to notify him. *See Latham v. Wells Fargo Bank N.A.*, 987 F.2d 1199, 1201 (5th Cir. 1993)(in discussing Fed.R.Civ.P. 77(d), the Fifth Circuit noted the general idea "that parties have a duty to inquire periodically into the status of their litigation"); *accord Jones v. Estelle*, 693 F.2d 547, 549 (5th Cir. 1982)(noting "implicit burden" to make inquiries in appeal of habeas by state prisoner who was previously represented by counsel). Petitioner's obligation to timely file a federal application, including his obligation to keep himself informed of the status of state litigation filed as a prerequisite to federal litigation, is a matter of federal law. Texas courts also impose a similar obligation on litigants. *See, e.g., Plains Growers, Inc. v. Jordan*, 519 S.W.2d 633, 643 (Tex. 1974)("where ... there is no statute or rule to the contrary, parties ... are expected to keep themselves informed of the time a case is set for trial); *see also Metro Dairy Queen Stores v. Dominguez*, 883 S.W.2d 322, 323 (Tex.App.-El Paso 1994)(failure by clerk to give statutorily mandated notice of judgment does not impair its finality); *see also* TEX. R. APP. P. 32.2(a)(2), 38.1(a).

The apparent lack of familiarity with the Texas procedural rule concerning the proper form for filing a state writ application does not help Petitioner concerning equitable tolling. *See Turner v. Johnson*, 177 F.3d 390, 392 (5th Cir. 1999)(*citation omitted)*(the Fifth Circuit noted that it has "held that neither a plaintiff's unfamiliarity wit the legal process nor his lack of representation during the applicable filing period merits equitable tolling"). Thus, even if Petitioner filed his state writ *pro se*, which he did not do, he would not be entitled to equitable tolling. Neither Petitioner's nor his state habeas lawyer's lack of knowledge justifies equitable tolling. *Id.* The Fifth Circuit also stated in *Turner* that "lack of knowledge of the filing deadlines," "unfamiliarity with the legal process," and "ignorance of legal rights" generally do not justify tolling. *Id.* Excusable neglect does not support equitable tolling. *See Ott v. Johnson*, 192 F.3d 510, 513-14 (1999). The Petitioner has not shown an entitlement to equitable tolling. *Phillips*, 216 F.3d at 511 (the petitioner bears burden of proof concerning

equitable tolling in the AEDPA context).

Accordingly, it is ORDERED that Respondent's Motion to Dismiss Pursuant to 28 U.S.C. § 2244(d)[Docket Entry No. 7] is GRANTED. This action is DISMISSED with prejudice as time barred under 28 U.S.C. § 2244(d).

This Court finds that Petitioner has not made a substantial showing that reasonable jurists "would find it debatable whether the district court was correct in its procedural ruling." *Beasley v. Johnson*, 242 F.3d 248, 263 (5th Cir.)(quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000, *cert. denied*, 534 U.S. 945 (2001). This Court finds that a Certificate of Appealability should not issue.

Signed at Houston, Texas on January 12, 2004.

DAVID HITTNER
United States District Judge

APP. 10

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS
OF TEXAS
P. O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS
78711

RE: Writ No. 53,193-01
STYLE: Leonardo Manuel Lopez
TRIAL CT NO: 0639965-B
September 18, 2002

This is to advise that the Court has denied without written order the application for writ of habeas corpus on the findings of the trial court without a hearing.

DISTRICT CLERK HARRIS COUNTY
POST CONVICTION WRITS
P. O. BOX 4651
HOUSTON, TX 77210

APP. 11

COURT OF CRIMINAL APPEALS
P. O. BOX 12308, CAPITOL STATION
AUSTIN, TEXAS 78711

Sharon Keller
Presiding Judge
Lawrence E. Meyers
Tom Price
Paul Womack
Cheryl Johnson
Mike Keasler
Barbara P. Hervey
Charles R. Holcomb
Cathy Cochran
Judges

Troy Bennett, Jr.
Clerk
512-463-1551

Richard E. Wetzel
General Counsel
512-463-1600

March 22, 2002

Charles Bacarisse, District Clerk
Harris County
P. O. Box 4651
Houston, TX 77210-4651

RE: Trial Court Writ Number: 0639695-A
LEONARDO MANUEL LOPEZ

Dear Clerk:

We are returning this application because it does not comply with Rule 73.2 of the Texas Rules of Appellate Procedure. Specifically:

___ A petition seeking relief from a final felony conviction under Code of Criminal Procedure Article 11.07, must be on the prescribed form.

___ Multiple convictions may not be challenged on one form.

XX **The grounds must be set out on the form rather than by**

reference.

____ The applicant has used the federal form.

____ A petition seeking relief from a final felony conviction under Code of Criminal Procedure Article 11.07, must be filed with the District Clerk prior to being sent to us for processing.

Please send a copy of this letter along with the application to the inmate. Thank you for your cooperation. Should you have any questions, please do not hesitate to contact our court at (512) 463-1600.

Sincerely,

Troy C. Bennett, Jr.
Clerk

Supreme Court Building 201 West 14th Street, Room 106,
Austin, Texas 78701
Website www.cca.courts.state.tx.us

ARTICLE 11.07. PROCEDURE AFTER CONVICTION WITHOUT DEATH PENALTY

Sec. 1. This article establishes the procedures for an application for writ of habeas corpus in which the applicant seeks relief from a felony judgment imposing a penalty other than death.

Sec. 2. After indictment found in any felony case other than a case in which the death penalty is imposed, and before conviction, the writ must be made returnable in the county where the offense has been committed.

Sec. 3. (a) After final conviction in any felony case, the writ must be made returnable to the Court of Criminal Appeals of Texas at Austin, Texas.

(b) An application for writ of habeas corpus filed after final conviction in a felony case, other than a case in which the death penalty is imposed, must be filed with the clerk of the court in which the conviction being challenged was obtained, and the clerk shall assign the application to that court. When the application is received by that court, a writ of habeas corpus, returnable to the Court of Criminal Appeals, shall issue by operation of law. The clerk of that court shall mak3e appropriate notation thereof, assign to the case a file number (ancill[illegible] that of the conviction being challenged), and forward a copy of the application by certified mail, return receipt re4quirested, or by personal service to the attorney representing the state in that court, who shall answer the application not later than the 15th day after the date the copy of the application is received. Matters alleged in the application not admitted by the state are deemed denied.

(c) Within 20 days of the expiration of the time in which the state is allowed to answer, it shall be the duty of the convicting court to decide whether there are controverted, previously unresolved facts material to the legality of the applicant's confinement. Confinement means confinement for any offense or any collateral consequences resulting from the conviction that is the basis of the

instant habeas corpus. If the convicting court decides that there are no such issues, the clerk shall immediately transmit to the Court of Criminal Appeals a copy of the application, any answers filed, and a certificate reciting the date upon which that finding was made. Failure of the court to act within the allowed 20 days shall constitute such a finding.

(d) If the convicting court decides that there are controverted, previously unresolved facts which are material to the legality of the applicant's confinement, it shall enter an order within 20 days of the expiration of the time allowed for the state to reply, designating the issues of fact to be resolved. To resolve those issues the court may order affidavits, depositions, interrogatories, and hearings, as well as using personal recollection. Also, the convicting Court may appoint an attorney or a magistrate to hold a hearing and make findings of fact. An attorney so appointed shall be compensated as provided in Article 26.05 of this code. It shall be the duty of the reporter who is designated to transcribe a hearing held pursuant to this article to prepare a transcript within 15 days of its conclusion. After the convicting court makes findings of fact or approves the findings of the person designated to make them, the clerk of the convicting court shall immediately transmit to the Court of Criminal Appeals, under one cover, the application, any answers filed, any motions filed, transcripts of all depositions and hearings, any affidavits, and any other matters such as official records used by the court in resolving issues of fact.

Sec. 4. (a) If a subsequent application for writ of habeas corpus is filed after final disposition of an initial application challenging the same conviction, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:

(1) the current claims and issues have not been and could not have been presented previously in an original application or in a previously considered application filed under this article because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application; and

(2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt.

(b) For purposes of Subsection (a)(1), a legal basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the legal basis was not recognized by and could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date.

(c) For purposes of Subsection (a)(1), a factual basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date.

Sec. 5. The Court of Criminal Appeals may deny relief upon the findings and conclusions of the hearing judge without docketing the cause, or may direct that the cause be docketed and heard as though originally presented to said court or as an appeal. Upon reviewing the record the court shall enter its judgment remanding the applicant to custody or ordering his release, as the law and facts may justify. The mandate of the court shall issue to the court issuing the writ, as in other criminal cases. After conviction the procedure outlined in this Act shall be exclusive and any other proceeding shall be void and of no force and effect in discharging the prisoner.

Sec. 6. Upon any hearing by a district judge by virtue of this Act, the attorney for applicant, and the state, shall be given at least seven full days' notice before such hearing is held.

Sec. 7. When the attorney for the state files an answer, motion, or other pleading relating to an application for a writ of habeas corpus or the court issues an order relating to an application for a writ of habeas corpus, the clerk of the court shall mail or deliver to the applicant a copy of the answer, motion, pleading, or order.

RULE 73. POST-CONVICTION APPLICATIONS FOR WRITS OF HABEAS CORPUS

73.1 Form of Application in Felony Cases (other than Capital).

(a) *Prescribed Form.* An application for post conviction habeas corpus relief in a felony case without a death penalty, under Code of Criminal Procedure article 11.07, must be made in the form prescribed by the Court of Criminal Appeals in an order entered for that purpose.

(b) *Availability of Form.* The clerk of the convicting court will make the forms available to applicants on request, without charge.

(c) *Contents.* The person making the application must provide all information required by the form. The application must specify all grounds for relief, and must set forth in summary fashion the facts supporting each ground. The application must not cite cases or other law. Legal citations and arguments may be made in a separate memorandum. The application must be typewritten or handwritten legibly.

(d) *Verification.* The application must be verified by either:

(1) oath made before a notary public or other officer authorized to administer oaths, or

(2) if the person making the application is an inmate in the Institutional Division of the Department of Criminal Justice or in a county jail, an unsworn declaration in substantially the form required in Civil Practices and Remedies Code chapter 132.

73.2. Noncompliance. The clerk of the convicting court will not file an application that is not on the form prescribed by the

Court of Criminal Appeals and will return the application to9 the person who filed it, with a copy of the official form. The clerk of the Court of Criminal Appeals may, without filing an application that does not comply with this rule, return it to the clerk of the convicting court, with a notation of the defect, and the clerk of the convicting court will return the application to the person who filed it, with a copy of the official form.

73.3. Summary Sheet. When a district clerk transmits the recording a post-conviction application for writ of habeas corpus under Code of Criminal Procedure articles 11.07 or 11.071, the district clerk must prepare and transmit a summary sheet that includes the following information:

(a) the convicting court's name and county, and the name of the judge who tried the case;

(b) the applicant's name, the offense, the plea, the cause number, the sentence, and the date of sentence, as shown in the judgment of conviction;

(c) the cause number of any appeal from the conviction and the citation to any published report;

(d) whether a hearing was held on the application, whether findings of fact were made, any recommendation of the convicting court, and the name of the judge who presided over the application.

The Court of Criminal Appeals may by order adopt a form of summary sheet that the district clerks must use.

73.4. Action on Application. The Court may deny relief based upon its own review of the application or may issue such other instructions or orders as may be appropriate.

(Effective September 1, 1997, amended by Court of Criminal Appeals August 10, 2000, October 16, 2000 and November 8, 2000, eff. January 1, 2001; amended by Supreme Court September

12, 2000, eff. January 1, 2001.)

Notes and Comments.

Comment to 1997 change: This is former Rule 4 of the Appendix for Criminal Cases. The rule is amended without substantive change.

Comment to 2000 change. Rules 73.1 and 73.2 are added, and a form is added in an appendix.

"Publisher's Note. The Court of Criminal Appeals order dated October 16, 2000, provides in part:

"2. These changes take effect January 1, 2001. Unless this order provides otherwise, they shall govern all proceedings in motions for new trial, appeals, petitions for discretionary review, and petitions or applications for extraordinary writs thereafter brought and in all such proceedings then pending except to the extent that in the opinion of the court their application in a particular proceeding then pending would not be feasible or would work injustice, in which case the former procedure may be followed.

"3. The notes and comments appended to these changes are incomplete and included only for the convenience of the bench and bar, and are not a part of the rules."